THE YALE LAW JOURNAL

JONATHAN M. JUSTL

Disastrously Misunderstood: Judicial Deference in the Japanese-American Cases

ABSTRACT. This Note offers a new framework to evaluate judicial deference in cases reviewing government actions during national emergencies. Rejecting the conventional approach assessing deference as a matter of degree or as a condition present or not present, this Note offers a nuanced framework to evaluate deference that considers both degree and form. It identifies two forms of deference: perception deference as an independent decision not to reach an independent conclusion concerning whether and to what extent a threat exists, where the decision is expressed through the adoption of government decisionmakers' conclusions, and means deference as an independent decision not to reach an independent conclusion concerning the proper means to respond to the perceived threat, where the decision is expressed through the adoption of government decisionmakers' conclusions. Applying this framework to the Japanese-American cases, this Note concludes the Supreme Court exercised little perception deference and complete means deference, a finding with important implications for four prominent scholarly debates.

AUTHOR. Yale Law School, J.D. expected 2010; B.A. Vanderbilt University, 2006. I would like to give special thanks to Caroline Edsall for her extraordinary commitment and wholehearted generosity. I would also like to give special thanks to Benjamin Lindy for his insightful comments in the initial development of this Note. Additionally, I would like to thank Benjamin Mills, Daniel Egers, Michael J. Hooi, Ty Johannes, John Richard Harrison, Esq., and Ari Wisch for their unfailing support over the extraordinary last four years of my life. I would not be where I am today without the confidence they and other friends have instilled within me to persevere and believe in myself. They made this Note possible, and I am deeply grateful for the positive difference they have made in my life.

NOTE CONTENTS

INTRODUCTION

The judicial role in reviewing governmental actions taken in response to national emergencies is descriptively complex and normatively controversial. Descriptively, these cases are difficult. National emergencies[1] require courts to balance two competing interests: civil liberties[2] and national security.[3] Aharon Barak, the former President of the Supreme Court of Israel, describes the tension individual judges experience:

> It is hard to be a judge. It is even harder to be a good and worthy judge. It is sevenfold harder to be a good and worthy judge in a democracy under terror . . . . [B]ecause when terror strikes a democracy, the tension between the needs of the community and the liberty of the individual reaches its peak.[4]

Normatively, the judiciary's proper role is controversial. Scholars have long disagreed about whether and to what extent Cicero's maxim that "[w]hen arms speak, the laws are silent"[5] should be true.[6] In short, the judiciary must navigate a careful course between lawlessness[7] and national suicide[8] to

---

1. When this Note references "national emergencies," it references war and terrorist attacks because they pose a political challenge to the sovereign authority of the United States over its territory. *See* BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 43-44 (2006); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1035-36 (2004) [hereinafter Ackerman, *The Emergency Constitution*].

2. Within this Note, civil liberties reference all aspects of law, including the Constitution, statutes, regulations, and judicial interpretations, that affect individual freedom. *See* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 149 (2006).

3. *See* AHARON BARAK, THE JUDGE IN A DEMOCRACY 291, 310 (2006).

4. *Id.* at 310.

5. CICERO, On Behalf of Milo, *in* THE SPEECHES 7, 17 (N.H. Watts trans., rev. ed. 1953).

6. *Compare* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224-25 (1998) ("It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime."), *with* Owen Fiss, *Law Is Everywhere*, 117 YALE L.J. 256, 259 (2007) ("The governing assumption of American society is that these war measures will be undertaken within the terms of the Constitution . . . . Ours is a Constitution for times of war as well as times of peace.").

7. *See* BARAK, *supra* note 3, at 305 (stating that judges must ensure the government fights terrorism legally and constitutionally within the framework of the law); *cf.* Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 29 (2002) (arguing that human rights law must constrain the government's use of force in the war on terrorism).

8. *See* BARAK, *supra* note 3, at 291 ("[A] constitution is not a prescription for national suicide.").

accommodate national security needs within a framework that also preserves fundamental civil liberties. Deference,[9] if used properly, may be a helpful tool in reaching the proper balance.[10]

The question of how the Supreme Court has historically accommodated civil liberties and national security in emergency situations has received heightened attention in recent years because of the ongoing threat of terrorism.[11] Nevertheless, the terrorist threats are not the first national emergency the United States has had to face.[12] As the United States prospectively considers how to balance civil liberties and security in confronting the terrorist threat, the country should consider how it has historically done so. The Japanese-American cases from the Second World War[13] provide helpful lessons about how the Court balanced these interests and have important implications for modern debates about the balance the Supreme Court should strike in reviewing government actions responding to future national emergencies.

This Note offers a new framework for understanding the practice of judicial deference in national emergency contexts and applies the proposed

---

9. In Section II.A., this Note defines judicial deference as an independent decision not to reach an independent conclusion interpreting a set of facts presented to a court expressed through the adoption of another decisionmaker's conclusion.

10. *See* Robert J. Pushaw, Jr., *Defending Deference: A Response to Professors Epstein and Wells*, 69 MO. L. REV. 959, 970 (2004) ("Subject to the 'political question' exception . . . , I agree with the Court's general approach of deferentially reviewing the executive's military actions. In this uniquely delicate context, room must be allowed for judges to make a sophisticated legal and political calculus based on the facts and nuances of each case."); *cf.* Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1198 (2007) (suggesting that giving the executive deference in foreign relations law is normatively appropriate).

11. *See, e.g.*, Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-*Hamdi *World*, 54 U. KAN. L. REV. 307, 310 (2006) ("The comparisons of terrorism detentions and the [Japanese] internment are compelling and the subject of much scholarly discourse."); Patrick O. Gudridge, *Remember* Endo*?*, 116 HARV. L. REV. 1933, 1934 (2003) ("Since September 11, *Korematsu* and its associations have figured prominently in public debate about the proper scope of antiterrorism efforts."); Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793, 808 (2003) ("Indeed, I would not be at all surprised if *Korematsu* ends up being cited with approval by the Supreme Court some time during the current war on terrorism.").

12. David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2587-88 (2003) ("The United States has been under one state of emergency or another since 1933.").

13. The Japanese-American cases considered in this Note are *Ex parte Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); and *Hirabayashi v. United States*, 320 U.S. 81 (1943).

framework to the Japanese-American cases. While these cases have long commanded scholars' attention,[14] the practice of judicial deference in these cases remains fundamentally misunderstood. Eugene V. Rostow's argument that the Supreme Court did not critically review the factual basis for the military's decisions[15] and completely deferred to the military[16] has become the baseline of modern scholarship. Since Rostow's critique, scholars have not seriously challenged this position's accuracy.[17]

Nevertheless, Rostow misunderstood the Japanese-American cases. He made a series of questionable assumptions that raise serious concerns about the line of scholarship attempting to identify the Japanese-American cases' lessons for today's problems. First, Rostow gave too much weight to *Korematsu v. United States*, one of the most despised decisions in American history.[18] While *Korematsu* seems "obviously wrong,"[19] scholars often forget *Ex parte Endo*,[20]

---

14. *See, e.g.*, Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 492 (1945) (criticizing the Japanese-American cases).

15. *Id.* at 531.

16. *Id.* at 503 ("In a bewildering and unimpressive series of opinions . . . the Court chose to assume that the main issue of the cases—the scope and method of judicial review of military decisions—did not exist.").

17. *See, e.g.*, Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1034 (2003); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 1000 (1999); Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 CAL. L. REV. 2203, 2203 (2007); Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 903-04 (2004); Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023, 1056 (2005) (book review) (arguing that the Supreme Court "has famously folded up its tent and run for cover rather than protect civil liberties" during times of war and citing *Korematsu* in support); *cf.* Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 INT'L J. CONST. L. 296, 311 (2004) ("The decision [*Korematsu*] is thought to offer numerous lessons about the inability of courts during wartime to provide any check on political excesses, particularly those jointly endorsed by the executive and legislature."); Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589, 1601 (2006) (arguing that national emergencies promote deference to the executive branch); David Cole, *No Reason To Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1329 (2008) (reviewing ERIC A. POSNER & ADRIAN VERMUELE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS (2007)) ("Most observers of American history look back with regret and shame on our nation's record of respecting civil liberties in times of crisis.").

18. *See* Gudridge, *supra* note 11, at 1937-39. By 2002, eight of the nine sitting Supreme Court Justices had openly criticized *Korematsu* as wrongly decided. *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 993 (2002).

19. Gudridge, *supra* note 11, at 1933.

decided the very same day as *Korematsu*, where the Supreme Court held that interning Japanese-Americans known to be loyal was unlawful.[21] Giving due consideration to *Endo* complicates the scholar's task of interpreting the Supreme Court's war jurisprudence. But to ignore *Endo* is to ignore a case every bit as important to the Supreme Court's war jurisprudence as *Hirabayashi* and *Korematsu*.

Second, Rostow made a critical oversight in the application of his conception of deference to the Japanese-American cases. He seems to have assumed that the outcomes in the Japanese-American cases were so invidious that they could only be the product of deference. He wrote:

> If the Court had stepped forward in bold heart to vindicate the law and declare the entire program illegal, the episode would have been passed over as a national scandal, but a temporary one altogether capable of reparation. . . . [The Supreme Court] has upheld an act of military power without a factual record in which the justification for the act was analyzed.[22]

By thus limiting the choices either to deferring to the military without demanding a factual record, or not deferring and necessarily striking down the government's policies, Rostow overlooked a third possible choice: not deferring, but ultimately agreeing with the military. In short, Rostow assumed that agreement with another decisionmaker's interpretation necessarily means deference occurs. That assumption is logically wrong.[23] As this Note argues, the choice Rostow overlooked is the most accurate account.

Third and most importantly, Rostow misconceived what deference is. He incorrectly assumed deference is monolithic and can only exist as a condition present or not present when reviewing government decisionmakers' overall policy choices of curfew,[24] exclusion,[25] and internment[26] to respond to a

---

20. *See id.* at 1934.

21. *Ex parte* Endo, 323 U.S. 283, 302-04 (1944) (ordering the unconditional release of Japanese-Americans known to be loyal from internment camps).

22. Rostow, *supra* note 14, at 491.

23. *See* Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1075 (2008).

24. Hirabayashi v. United States, 320 U.S. 81, 105 (1943) (upholding the government's curfew policy for Japanese-Americans in designated military areas on the West Coast).

25. Korematsu v. United States, 323 U.S. 214, 224 (1944) (upholding the government's decision to exclude Japanese-Americans from the West Coast).

26. *Endo*, 323 U.S. at 297 (striking down the government's decision to intern Japanese-Americans known to be loyal).

perceived threat of espionage and sabotage by Japanese-Americans on the West Coast.[27] Such an assumption underestimates the complexity and fluidity of the ways in which judges may defer to another decisionmaker's decision.

Judicial deference is an independent decision not to reach an independent conclusion interpreting a set of facts presented to a court, where the decision is expressed through the adoption of another decisionmaker's conclusion.[28] To evaluate judicial deference precisely, scholars must evaluate judicial deference as a matter of degree and form. The degree inquiry consists of evaluating where on a scale from low to high deference a decision falls. This inquiry is common.[29] However, there is more to deference than its degree. The form inquiry considers the different aspects of decisionmaking reviewed in a particular case. It considers the manner in which a judge does and does not defer. It thus fills a void in existing scholarly accounts of deference.

This Note identifies two forms of deference. The first is perception deference, defined as acceptance without critical review of government decisionmakers' judgments about whether and to what extent a threat exists. The second is means deference, defined as acceptance without critical review of government decisionmakers' judgments about the proper means to respond to the perceived threat. By adding the degree inquiry to these two forms of deference, this model anticipates an infinite number of degrees of perception and means deference. Very few correlations exist between the two degrees.

A helpful model to visualize the forms of judicial deference is a graph with "perception deference" as the x-axis and "means deference" as the y-axis. The further along either axis a point is, the greater the degree of deference. When a court reviews a government decisionmaker's actions responding to a national emergency, some point within the first quadrant represents the correct degree of deference given to each aspect of the decisionmaker's decision.

Judicial deference existed in different degrees in the Japanese-American cases depending on the form of the Supreme Court's inquiry into the government's policy choices of curfew,[30] exclusion,[31] and internment.[32] Even

---

27. *See* Rostow, *supra* note 14, at 503 (suggesting that the Court categorically deferred to government decisionmakers in the Japanese-American cases).

28. For a more in-depth discussion, see *infra* Section II.A.

29. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 608-09 (2003) (stating that judicial deference to the executive during emergencies exists as a matter of degree); Robert J. Purshaw, Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1046-47 (2007) ("The degree of deference to the executive [by the Supreme Court] ebbs and flows . . . .").

30. Hirabayashi v. United States, 320 U.S. 81, 105 (1943).

though a high degree of means deference existed in *Hirabayashi* and *Korematsu*, the Supreme Court exercised little perception deference in the Japanese-American Cases. Contrary to Rostow's position, the Supreme Court did not completely substitute the government's judgment for its own. Although the Supreme Court ultimately agreed with the government's perception of a threat from disloyal Japanese-Americans in *Hirabayashi* and *Korematsu*, it reached that conclusion independently. It made its own decision interpreting the significance of the facts before it. This finding is at odds with the conventional understanding of the Japanese-American cases.[33]

This reassessment of judicial deference's role has implications for four ongoing debates that have recently generated controversy because of the threat of terrorism: (1) whether the Supreme Court correctly decided the Japanese-American cases, (2) general criticisms of judicial deference, (3) how the Supreme Court historically balances civil liberties and security during national emergencies, and (4) whether and how to accommodate extraordinary situations under the Constitution. While not definitively resolving any of the four debates, the conclusion reached highlights the extent to which meaningful progress in these debates requires adopting a more nuanced understanding of judicial deference.

Part I briefly discusses the background of the Japanese-American cases, including their factual context and holdings. In Part II, this Note applies a new framework to assess judicial deference to the Japanese-American cases. An evaluation of the implications of the conclusion reached for four current debates follows in Part III. The Conclusion briefly discusses the necessary parameters to ensure that normative prescriptions of the Japanese-American cases' lessons rest on a sound foundation.

---

31. Korematsu v. United States, 323 U.S. 214, 224 (1944).

32. *Ex parte* Endo, 323 U.S. 283, 304 (1944).

33. *See, e.g.*, Rostow, *supra* note 14, at 519-20; Solove, *supra* note 17, at 943; Wells, *supra* note 17, at 903-04; *cf.* Gross, *supra* note 17, at 1034 (arguing that courts have systematically reviewed government actions and decisions with "a highly deferential attitude" during national emergencies).

I. HISTORY OF THE JAPANESE-AMERICAN CASES

In popular imagination, the Japanese-American cases are infamous.[34] Nevertheless, their infamy should not excuse failing to understand precisely what happened. The stakes are too high.[35] A careful examination of their factual context and particular holdings provides an important backdrop to the discussion in Parts II and III by revealing that the record that reached the Supreme Court, however distorted it was,[36] did not mandate the outcomes. The Supreme Court had sufficient information to form an independent conclusion concerning the relationship between Japanese ancestry and disloyalty in war. As Part II demonstrates, that is precisely what the Court did.

A. Background of the Japanese-American Cases

After the Japanese attacked Pearl Harbor, the United States declared war against Japan on December 8, 1941.[37] Soon thereafter, military and executive officials began preparing a strategy to protect national security.[38] President Franklin Delano Roosevelt issued Executive Order No. 9066 on February 19, 1942, authorizing the Secretary of War and designated military commanders to create zones in which military officials could restrict civilian movement and expel civilians.[39] After the Secretary of War designated Lieutenant General J. L. DeWitt as Military Commander of the Western Defense Command pursuant

---

34. *Cf.* Cole, *supra* note 18, at 993 (noting that eight sitting Supreme Court Justices had said *Korematsu* was wrongly decided by 2002); Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649, 650 (1997) ("This disregard for constitutional rights, justified at the time by claims of military necessity, and upheld by the Supreme Court, is now universally condemned."); Gudridge, *supra* note 11, at 1933 (stating that *Korematsu* "now seems so obviously wrong"); Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 296 ("*Korematsu* seems now to be regarded almost universally as wrongly decided."); Elbert Lin, Case Comment, Korematsu *Continued* . . ., 112 YALE L.J. 1911, 1916 (2003) (calling *Korematsu* "widely despised").

35. *Cf.* Stone, *supra* note 17, at 2205 (suggesting that the internment of Japanese-Americans was the "critical civil liberties issue in World War II").

36. Scholars agree that the government deliberately withheld important evidence from the Supreme Court. *See, e.g.*, PETER IRONS, JUSTICE AT WAR 217-18 (1983); Eric K. Yamamoto, Korematsu *Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1, 16 (1986).

37. Act of Dec. 8, 1941, ch. 561, 55 Stat. 795 (1941) (declaring war on Japan).

38. *See* Hirabayashi v. United States, 320 U.S. 81, 85-86 (1943).

39. *See id.* (citing Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942)).

to Executive Order No. 9066,[40] General DeWitt issued a series of public proclamations establishing military zones in strategically important areas on the West Coast and asserting authority to expel persons from those areas as necessary.[41]

Meanwhile, President Roosevelt issued Executive Order 9102 on March 18, 1942, which created the War Relocation Authority and vested it with authority to remove and resettle persons excluded by military officials pursuant to Executive Order No. 9066.[42] On March 21, 1942, Congress ratified and confirmed Executive Order No. 9066,[43] which authorized criminal penalties for persons disobeying exclusion orders.[44] General DeWitt issued Public Proclamation No. 3 on March 24, 1942, which established a curfew for all persons of Japanese ancestry requiring them to be in their homes between 8:00 p.m. and 6:00 a.m. every night.[45] Throughout the spring, General DeWitt issued a series of orders excluding all persons of Japanese ancestry from designated military areas on the West Coast.[46] The exclusion orders eventually resulted in their resettlement in internment camps.[47] Officially, the purpose of internment camps was to discern loyal and disloyal Japanese-Americans, and eventually free loyal Japanese-Americans.[48] However, even after public officials had determined that Japanese-Americans were loyal, they could not leave the internment camps when public officials determined that communities were hostile to Japanese-Americans.[49] Their confinement had no definite end.[50]

Some scholars have strongly suggested that legitimate military concerns may have been a pretext to disguise invidious motives. The most commonly cited invidious motive is racism.[51] Rostow argued that the wartime treatment

---

40. *See id.* at 86.

41. *See id.* at 86-87; *Ex parte* Endo, 323 U.S. 283, 286-87 (1944).

42. *See Hirabayashi*, 320 U.S. at 87 (citing Exec. Order No. 9102, 7 Fed. Reg. 2165 (March 20, 1942)).

43. *Endo*, 323 U.S. at 287 (citing Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (1942)).

44. *See Hirabayashi*, 320 U.S. at 87-88 (citing Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (1942)).

45. *See id.* at 88 (citing Public Proclamation No. 3, 7 Fed. Reg. 2543 (Mar. 24, 1942)).

46. *See id.* at 88-89.

47. *See Endo*, 323 U.S. at 289.

48. *See id.* at 291.

49. *See id.* at 293.

50. *See* Rostow, *supra* note 14, at 496.

51. *See id.* at 489; Tushnet, *supra* note 34, at 288; Alfred C. Yen, *Praising with Faint Damnation—The Troubling Rehabilitation of* Korematsu, 40 B.C. L. REV. 1, 1 (1998).

of Japanese-Americans was not justifiable by military necessity, but rather was "calculated to produce both individual injustice and deep-seated social maladjustments of a cumulative and sinister kind."[52] While scholars continue to debate whether public officials reasonably feared a Japanese invasion when devising the policies,[53] it now seems clear that hysteria to some degree promoted unreasonable perceptions of risk[54] fed by racial prejudice and animus.[55]

In addition, Rostow argued that perceiving a threat of espionage and sabotage by Japanese-Americans is inherently racist because it assumes that a group characteristic—ethnic ancestry—is probative evidence of loyalty.[56] Rostow rejected the proffered security concerns because public officials had already arrested many allegedly disloyal Japanese-Americans immediately after the Japanese attacked Pearl Harbor,[57] no actual proven events of sabotage by Japanese-Americans had occurred before public officials expelled Japanese-Americans from the West Coast,[58] a suspicious five-month time gap occurred between the attack on Pearl Harbor and the exclusion orders,[59] and public officials largely allowed Japanese-Americans residing in Hawaii to live in peace even though Hawaii was in greater danger of attack.[60] Having rejected the proffered security concerns for these reasons, Rostow argued that racism was the only convincing explanation of the government's policies.[61]

While Rostow offers a strong argument, the evidence he accumulates and the fact that he made the argument within a year of *Korematsu* and *Endo*[62] actually undermines his deference argument. His ability to make such an argument so close in time to the decisions shows that the Supreme Court could

---

52. *See* Rostow, *supra* note 14, at 489.

53. *Compare* REHNQUIST, *supra* note 6, at 211 (arguing that at the time the internment program was put into effect, the fear of the Japanese invading the West Coast was real), *with* Rostow, *supra* note 14, at 496 ("The dominant factor in the development of [the internment and exclusion] policy was not a military estimate of a military problem, but familiar West Coast attitudes of race prejudice.").

54. *See* Issacharoff & Pildes, *supra* note 17, at 310.

55. *See* Wells, *supra* note 17, at 909.

56. *See* Rostow, *supra* note 14, at 492, 495-96.

57. *See id.* at 492, 496.

58. *See id.* at 496.

59. *See id.* at 507.

60. *See id.* at 494.

61. *See id.* at 496-97; 532-33.

62. *The Yale Law Journal* published Rostow's article in June 1945 and the Supreme Court decided *Korematsu* and *Ex parte Endo* in December 1944.

have reached the same conclusion in these cases. The core underlying facts were not a secret. For instance, the briefs filed in these cases discussed very similar facts to those cited by Rostow[63] and presented very similar arguments.[64] Therefore, the Supreme Court had sufficient facts to strike down the government's policies. Because it had sufficient facts, the manner in which

---

63. *See, e.g.*, Brief for Appellant at 71, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22) (noting that the government had not charged even one Japanese-American on the Hawaiian Islands with an act of disloyalty) [hereinafter Korematsu Brief for Appellant]; Brief of Japanese American Citizens League, Amicus Curiae at 3, *Korematsu*, 323 U.S. 214 (No. 22) (arguing that abundant, reliable information existed to prove Japanese-Americans were well assimilated and loyal when the government expelled Japanese-Americans); *id.* at 84-85 (noting the time gap between the Japanese attack on Pearl Harbor and the exclusion of Japanese-Americans from the West Coast); Brief for Appellant at 6, Hirabayashi v. United States, 320 U.S. 81 (1943) (No. 870) (noting that the government had not brought any charge of espionage, sabotage, or treasonable activity against any Japanese-American at the time it expelled Japanese-Americans from designated areas) [hereinafter Hirabayashi Brief for Appellant]; Brief for Northern California Branch of the American Civil Liberties Union, Amicus Curiae at 73-74, *Hirabayashi*, 320 U.S. 81 (No. 870) (arguing that no geographic theater of war existed on the West Coast and that enemies did not threaten American soil).

64. Opening Brief for Appellant at 31, *Ex parte* Endo, 323 U.S. 283 (1944) (No. 70) ("The existence of a state of war does not suspend constitutional rights."); Korematsu Brief for Appellant, *supra* note 63, at 11 ("Behind the mask of artificially created war-hysteria anti-Oriental pressure groups carried on their machinations designed to result in the deportation of these people."); *id.* at 56 (arguing that prejudice motivated the military's policies toward Japanese-Americans on the West Coast); Brief of Japanese American Citizens League, *supra* note 63, at 3 ("Evacuation was not a military necessity but was due to false reports of sabotage in Hawaii, to the activities of anti-oriental pressure groups and unscrupulous competitors; and most important of all to the admitted race prejudice of the Commanding General who issued the evacuation orders."); *id.* at 197 ("We contend that General DeWitt accepted the views of racists instead of the principles of democracy because he is himself a confessed racist."); Hirabayashi Brief for Appellant, *supra* note 63, at 15 ("Whatever the measures that war might justify, the wholesale attribution of disloyalty to a racial group of citizens by mere military order cannot, under the Constitution, be one of them."); *id.* at 19 ("If it be argued that war creates special problems the answer must always be that they must be solved under the Constitution. However great the emergency, its provisions control. At least such must be the answer in this Court."); *id.* at 21 ("Often the question has been raised whether this country could wage a new war without loss of its fundamental liberties at home. Here is one occasion for this Court to give an unequivocal answer to that question and show the world that we can fight for democracy and preserve it too."); Brief for Northern California Branch of the American Civil Liberties Union, *supra* note 63, at 74-75 ("What the military power has attempted to do [on the West Coast], however, is to set up an unauthorized limited military government or a limited provisional government over a segment of our civilian population on a race discrimination basis . . . ."); *id.* at 81 ("Loyalty to the government cannot be determined along ethnic lines."); *id.* at 104 (arguing that political pressure groups used war merely as a pretext to justify the expulsion of Japanese-Americans from the West Coast).

the Supreme Court deferred and did not defer to the government was decisive to the cases' outcomes.[65]

B. Holdings of the Japanese-American Cases

In *Hirabayashi*, the first major Japanese-American case, the Supreme Court upheld the curfew orders placed on Japanese-Americans residing in military areas.[66] Hirabayashi, an American citizen,[67] knowingly violated the curfew covering his residence.[68] The Supreme Court considered two issues surrounding his conviction: whether Congress unconstitutionally delegated its power on March 21, 1942, by confirming Executive Order No. 9066, and whether the curfew violated the Fifth Amendment.[69] After reviewing the series of authorizations Congress and President Roosevelt gave to military officials to establish restrictions for persons living in military areas, the Supreme Court held that Congress authorized the government to create an enforceable curfew policy.[70] Regarding the delegation challenge, the Supreme Court held that Congress and President Roosevelt acting together had the power to designate military commanders with powers to issue restrictions on civilians within the military areas[71] and, therefore, no unlawful delegation occurred.[72] While the Supreme Court acknowledged the odiousness of treating citizens differently based solely on ethnic ancestry, it nevertheless upheld the curfew orders

---

65. The government deliberately withheld from the Supreme Court facts and interpretations of facts by military officials that undermined the government's position. *See* Peter Irons, *Introduction: Righting a Great Wrong*, *in* JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES 3, 4 (Peter Irons ed., 1989); Natsu Taylor Saito, *Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States*, 1 YALE HUM. RTS. & DEV. L.J. 53, 75 (1998); Yamamoto, *supra* note 36, at 2-3. Nevertheless, these distortions are irrelevant to explanations of judicial deference for two reasons. First, as discussed above, sufficient evidence existed for the Supreme Court to strike down the government's policies in *Hirabayashi* and *Korematsu*. Second, the only relevant inquiry in accounting for deference is whether a judge engages in the *process* of passing judgment on the facts before him. However normatively contemptible the distortions appear in retrospect, they do not affect the descriptive analysis of deference in the Japanese-American cases.

66. Hirabayashi v. United States, 320 U.S. 81, 104-05 (1943).

67. *Id.* at 83-84.

68. *See id.* at 84, 89.

69. *See id.* at 83.

70. *Id.* at 89.

71. *Id.* at 91-92.

72. *Id.* at 92.

because of the threat posed by disloyal Japanese-Americans who were not easily identifiable.[73] It rejected Hirabayashi's Fifth Amendment challenge to his conviction.[74]

Korematsu was a more divisive case for the Supreme Court. The case concerned the constitutionality of Korematsu's conviction for failing to obey an exclusion order.[75] Applying the "most rigid scrutiny,"[76] the Supreme Court upheld the exclusion order and Korematsu's conviction.[77] The Supreme Court stated that it intended for *Endo* to decide the current validity of the internment camps.[78] *Korematsu* only decided the validity of the exclusion policy at the time government decisionmakers established it and Korematsu violated it.[79]

In *Endo*, the Supreme Court reviewed the lawfulness of interning Japanese-Americans found to be loyal and ordered their immediate, unconditional release.[80] Curiously, the main reason offered was not constitutional law,[81] but the lack of authorization by President Roosevelt and Congress for the War Relocation Authority to intern Japanese-Americans found to be loyal.[82] Theoretically, the Supreme Court left the constitutional issues untouched, a

---

73. *Id.* at 101.

74. *Id.* at 105.

75. Korematsu v. United States, 323 U.S. 214, 215-16 (1944).

76. *Id.* at 216. As discussed in Part II, two approaches would have offered more rigid scrutiny of the government's actions: (1) a high degree of perception deference and a low degree of means deference, and (2) a low degree of both perception and means deference.

77. *Id.* at 219. Scholars have questioned the Supreme Court's relatively relaxed interpretation in *Korematsu* of what the "most rigid scrutiny" entails. *See, e.g.*, Anthony F. Renzo, *Making a Burlesque of the Constitution: Military Trials of Civilians in the War Against Terrorism*, 31 VT. L. REV. 447, 547 (2007); Eric K. Yamamoto, Carly Minner & Karen Winter, *Contextual Strict Scrutiny*, 49 HOW. L.J. 241, 311 (2006). The Supreme Court has conceded that *Korematsu* vividly shows that even when applying the "most rigid scrutiny," the Supreme Court has "sometimes fail[ed] to detect an illegitimate racial classification." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236 (1995).

78. *See Korematsu*, 323 U.S. at 222 ("The *Endo* case . . . graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected."); Gudridge, *supra* note 11, at 1939.

79. *See Korematsu*, 323 U.S. at 219, 222.

80. *See Ex parte* Endo, 323 U.S. 283, 297, 304 (1944).

81. *See id.* at 297 ("[W]e do not come to the underlying constitutional issues which have been argued.").

82. *Id.* at 302 ("He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.").

point two concurring Justices noted and criticized.[83] For this reason, *Endo* is arguably a decision based on statutory interpretation.[84] However, constitutional principles may have also influenced the decision.[85]

II. ROLE OF JUDICIAL DEFERENCE IN THE JAPANESE-AMERICAN CASES

The role of judicial deference in the Japanese-American cases is misunderstood. Assessments to date wrongly assume that judicial deference only exists as a matter of degree[86] or as a condition present or not present.[87] Going beyond these traditional approaches, this Note evaluates the forms of deference present and not present in the Japanese-American cases by examining what aspects of the government's decisionmaking process did and did not receive deference. The inquiry yields a conclusion that calls into question current scholarship. Judicial deference existed in a low degree concerning the government's perception of a threat from disloyal Japanese-Americans and in a high degree concerning the means chosen to address the perceived threat. Therefore, deference was neither categorically present nor unquestionably present in an overall high degree. Perhaps the best evidence is the lack of any other satisfactory account of judicial deference that offers a consistent theory capable of explaining and reconciling the outcomes in *Hirabayashi*, *Korematsu*, and *Endo*.

---

83. *See id.* at 307-08 (Murphy, J., concurring) (stating that the internment camps were unconstitutional); *id.* at 308-10 (Roberts, J., concurring) (criticizing the majority opinion for avoiding the constitutional issues arising from the internment policy).

84. *See, e.g.*, Arthur H. Garrison, *The Judiciary in Times of National Security Crisis and Terrorism:* Ubi Inter Arma Enim Silent Leges, Quis Custodiet Ipsos Custodes?, 30 AM. J. TRIAL ADVOC. 165, 178-79 (2006); Issacharoff & Pildes, *supra* note 17, at 313.

85. *See, e.g.*, Gudridge, *supra* note 11, at 1956-58.

86. *See, e.g.*, Joel K. Goldstein, *Beyond* Bakke*:* Grutter-Gratz *and the Promise of* Brown, 48 ST. LOUIS U. L.J. 899, 924 n.194 (2004); Michael Kagan, *Destructive Ambiguity: Enemy Nationals and the Legal Enabling of Ethnic Conflict in the Middle East*, 38 COLUM. HUM. RTS. L. REV. 263, 278 (2007); Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 454 (2005).

87. *See, e.g.*, Rostow, *supra* note 14, at 503.

A. Definition of Judicial Deference

Judicial deference is a slippery concept to define precisely.[88] However, its requisite features are not particularly controversial.[89] Deference requires two elements. The first is freedom to reach an independent conclusion disagreeing with the decisionmaker in question.[90] The second is an affirmative choice to accept another decisionmaker's conclusion without reaching an independent conclusion.[91] These two features suggest a helpful definition of judicial deference: an independent judgment not to reach an independent conclusion interpreting a set of facts presented to a court that is expressed through the adoption of another decisionmaker's conclusion.

A useful feature of this definition is that it suggests the inadequacy of conclusions concerning judicial deference that describe deference only as a matter of degree with respect to a decisionmaker's overall judgment or as a condition present or not present. It does so because these positions assume there is only one interpretation of one set of facts to be made by courts.[92] That is often inaccurate. For instance, in the Japanese-American cases, the Supreme Court had to review at least two interpretations of two sets of facts: (1) whether Japanese-Americans posed a security threat and (2) the best means of

---

88. *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 4-5 (1983).

89. *Compare* Solove, *supra* note 17, at 946 (defining deference as "the practice of accepting, without much questioning or skepticism, the factual and empirical judgments made by the decisionmaker under review"), *with* Horwitz, *supra* note 23, at 1073 ("Deference, then, involves a decisionmaker (D1) setting aside its own judgment and following the judgment of another decisionmaker (D2) in circumstances in which the deferring decisionmaker, D1, *might* have reached a different decision.").

90. *See* Horwitz, *supra* note 23, at 1075-76; Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 665 (2000).

91. *See* Solove, *supra* note 17, at 946; *cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 138 (1977) (defining deference as judicial self-restraint that allocates to political institutions responsibility for deciding which rights to recognize); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 314 (1996) (defining a deferential judge as "cautious and circumspect, and thus hesitant about intruding" on another decisionmaker's decision); Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777, 780 (2008) ("At its core, deference is the ceding of one power in favor of another.").

92. Similarly, methods of judicial review such as strict scrutiny and rational basis review are best understood as descriptions of the degree of deference without an assessment of form. For instance, to say a court employed strict scrutiny does not answer what aspect of government decisionmaking received strict scrutiny. Thus, merely stating the method of judicial review assumes that there is only one interpretation of one set of facts to be made by a judge, and that the judge employs the same level of judicial review to all aspects of the government's decisionmaking process. In practice, both assumptions are frequently wrong.

responding to the perceived threat. When this Note references different "forms" of judicial deference, it references the different aspects of decisionmaking requiring interpretation in a particular case.

B. Conventional Understanding of Deference in the Japanese-American Cases

The conventional understanding of the Japanese-American cases offers two very similar accounts of judicial deference. The first position argues that the Supreme Court exercised a very high degree of deference in the cases.[93] The second position argues that the Supreme Court categorically deferred to military decisionmakers.[94] Despite this slight difference, the basic thrust of the conventional understanding is the same: the Supreme Court did not meaningfully police the government's policies toward Japanese-Americans and effectively abdicated judicial review once the government invoked military necessity as a justification for its actions.[95] Taking the next step, scholars then

---

93. *See, e.g.*, Paul G. Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and "Off-the-Record Wars,"* 73 GEO. L.J. 931, 962 (1985) (calling *Hirabayashi* "an example of extreme deference"); Dean Masaru Hashimoto, *The Legacy of* Korematsu v. United States*: A Dangerous Narrative Retold*, 4 UCLA ASIAN PAC. AM. L.J. 72, 120 (1996) ("[O]ur disagreement [with *Korematsu*] results from defining the appropriateness of the degree and place for judicial deference."); Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 410 (2006) ("Deference, however, can certainly be taken too far. Indeed, it gave us the terrible decision in *Korematsu*." (citation omitted)); Patricia Wald & Neil Kinkopf, *Putting Separation of Powers into Practice: Reflections on Senator Schumer's Essay*, 1 HARV. L. & POL'Y REV. 41, 65 (2007) (arguing that the Supreme Court gave "excessive deference").

94. *See, e.g.*, Masur, *supra* note 86, at 454 (arguing that the Supreme Court in *Korematsu* gave the military's factual assertions "almost limitless deference"); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1037-39 (1984-1985) (arguing that the Supreme Court in *Korematsu* effectively surrendered its power of judicial review to the political branches and essentially treated as a political question the military's policy toward Japanese-Americans); Luppe B. Luppen, Note, *Just When I Thought I Was Out, They Pull Me Back in: Executive Power and the Novel Reclassification Authority*, 64 WASH. & LEE L. REV. 1115, 1133 (2007) ("With its controversial ruling in *Korematsu*, the Supreme Court articulated a categorical principle of wartime judicial deference to the Executive Branch." (citation omitted)); *cf.* JACOBUS TENBROEK, EDWARD N. BARNHART & FLOYD W. MATSON, PREJUDICE, WAR AND THE CONSTITUTION 333 (1954) (arguing that the Supreme Court in the Japanese-American cases did not require evidence that the necessity of excluding Japanese-Americans from the West Coast was in fact the military's judgment and that the military's conclusion was reasonable); Grossman, *supra* note 34, at 661 (arguing that the Supreme Court's approach in *Hirabayashi* and *Korematsu* represents "supine deference").

95. *See, e.g.*, Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, 65 MD. L. REV. 907, 936 (2006); Yamamoto, *supra* note 36, at 1-2; *cf.* Masur, *supra* note 86, at 445 ("The perceived

conclude that the Japanese-American cases exemplify how national security needs trump civil liberties during national emergencies.[96] While some scholars have offered normative defenses of the cases,[97] a modern descriptive explanation disagreeing with the conventional understanding does not exist.

The approach taken by advocates of the conventional understanding is problematic. Advocates tend to merge normative criticisms and descriptive analysis of the Japanese-American cases, potentially allowing normative judgments inappropriately to inform what should be neutral descriptive analysis.[98] The problem with these analyses is not that the normative judgment is necessarily wrong. It is that combining the two inquiries undermines the persuasiveness of descriptive accounts by suggesting that a normative judgment colored the descriptive inquiry and made the descriptive conclusion inevitable regardless of countervailing evidence.[99]

In short, the conventional understanding concerning judicial deference in the Japanese-American cases is wrong. Not only do advocates fail to account for *Endo*,[100] their evaluations show a misunderstanding of precisely what deference is. The best evidence of their misunderstanding is their blunt

---

duty of courts and judges to defer to the factual assertions and judgments of executive branch actors in times of war represents the unifying principle of all modern wartime cases.").

96. *See, e.g.*, Tushnet, *supra* note 34, at 283-84; *cf.* Mark C. Rahdert, *Double-Checking Executive Emergency Power: Lessons from* Hamdi *and* Hamdan, 80 TEMP. L. REV. 451, 476 (2007) ("As the experience of *Korematsu* demonstrates, undue deference . . . may well present the gravest danger to the preservation of equal justice under law.").

97. *See, e.g.*, REHNQUIST, *supra* note 6, at 207-11 (defending *Korematsu*).

98. Lichtman, *supra* note 95, at 936 ("The World War II Japanese internment cases are probably the most glaring and notorious examples of the Court's willingness to kowtow before military judgment. . . . The key to the Court's approval of the curfew and relocation orders is their finding in both [*Hirabayashi* and *Korematsu*] that the military deemed these policies necessary."); Timothy Sandefur, *The Wolves and the Sheep of Constitutional Law: A Review Essay on Kermit Roosevelt's* The Myth of Judicial Activism, 23 J.L. & POL. 1, 36 (2007) ("An ironic honor roll of 'great moments in judicial deference' would have to include such shameful decisions as . . . *Korematsu*—not a pleasant record, to say the least."); Yamamoto, *supra* note 36, at 61 ("The potentially disastrous ramifications of continued ambiguity [in guidelines for governmental conduct in national emergencies] are illustrated by the *Korematsu* case itself in which the Court deferred to the government's unexamined assertion of military necessity and thereby sanctioned the tragic and unjustified deprivation of personal liberty.").

99. *Cf.* Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1762, 1824 (2009) (suggesting that emotion causes international law scholars "to overvalue the importance of international law and the extent to which it binds nations").

100. *Cf.* Gudridge, *supra* note 11, at 1934 & n.10 (arguing that constitutional law scholars tend to forget *Endo*).

assessments of the Supreme Court's approach in the Japanese-American cases as representing a high degree of deference[101] or categorical deference.[102] Rejecting approaches limiting evaluations of deference to overall degree or categorical presence, this Note adds a new dimension: an inquiry into the form of judicial deference. By examining what aspects and to what extent a government decisionmaker's judgment did or did not receive deference, this Note presents a comprehensive theory of judicial deference that accounts for the Supreme Court's approach in *Hirabayashi*, *Korematsu*, and *Endo*.

C. A New Framework To Evaluate Judicial Deference

The framework proposed in this Note begins from the premise that government decisionmakers must make different decisions in the course of the decisionmaking process to respond to national emergencies and that courts may defer to these judgments in different degrees. In devising policies toward Japanese-Americans, government decisionmakers made the following two decisions. First, they interpreted evidence to reach a decision concerning the existence and scope of the threat, if any, posed by Japanese-Americans. Once they identified a threat—regardless of whether they did so correctly—they had to interpret additional evidence to make a second decision about the proper means to respond to the threat. The curfew,[103] exclusion,[104] and internment[105] policies resulted from these two decisions.

The two forms of judicial deference identified in this Note correspond to these two decisions. Perception deference is an independent decision not to reach an independent conclusion concerning whether and to what extent a threat exists where the decision is expressed through the adoption of government decisionmakers' conclusion. Means deference is an independent decision not to reach an independent conclusion concerning the proper means to respond to the perceived threat where the decision is expressed through the adoption of government decisionmakers' conclusion.

---

101. *See* sources cited *supra* note 93.

102. *See* sources cited *supra* note 94.

103. Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding the government's curfew policy for Japanese-Americans in designated military areas on the West Coast).

104. Korematsu v. United States, 323 U.S. 214, 224 (1944) (upholding the government's decision to exclude Japanese-Americans from the West Coast).

105. *Ex parte* Endo, 323 U.S. 283 (1944) (striking down the government's decision to intern Japanese-Americans known to be loyal).

Considering the degree of judicial deference only becomes useful after precisely identifying the form of deference in question. The reason is that very few correlations exist between the degree to which a court engages in perception and means deference. To illustrate, imagine overall judicial deference as a single-quadrant graph with "perception deference" as the x-axis and "means deference" as the y-axis, with both axes ranging from zero to infinitely high. When a court reviews a government decisionmaker's actions, some point in the first quadrant represents the correct degree of perception and means deference. In the Japanese-American cases, that point is low perception deference and high means deference.

The combination of perception and means deference degrees has been different in past national emergency cases. Different accommodations of national security needs and civil liberties have resulted. In *Hamdi v. Rumsfeld*,[106] the Supreme Court exercised a relatively high degree of perception deference and a low degree of means deference. It did so by concluding that a presumption favoring the government's evidence that a person is an enemy combatant would be constitutional[107] but by checking the means chosen by the government by requiring that Hamdi receive notice and a fair opportunity to be heard before a neutral decisionmaker to challenge the government's position.[108] Conversely, a low degree of perception deference and a high degree of means deference is possible. A good example is *Ebel v. Drum*[109] where a district court struck down the exclusion of a German-American from a designated military area on the East Coast by concluding that the military's perception of a threat of espionage and sabotage on the East Coast was unreasonable[110] despite strongly suggesting that it would have deferred to

106. 542 U.S. 507 (2004).

107. *Id.* at 534 (stating that "[t]he Constitution would not be offended by a presumption in favor of the Government's evidence" that a person is an enemy combatant).

108. *Id.* at 533; *see also id.* at 532 (rejecting the government's preferred procedure when a United States citizen is held as an enemy combatant in the United States).

109. 52 F. Supp. 189 (D. Mass. 1943).

110. *See id.* at 197 ("I do not believe in the light of conditions prevailing in the Eastern Military Area in April of this year, the time when the exclusion order was applied, there was present a reasonable and substantial basis for the judgment the military authorities made, i.e., that the threat of espionage and sabotage to our military resources was real and imminent. Consequently, the order at the time it was applied was an excessive exercise of authority and invalid.").

military decisionmakers concerning its choice of means had it reached that question.[111]

Other combinations are also possible. In the district court decision vacating Korematsu's conviction, the district court exercised low perception deference and low means deference. The court argued that military necessity should never justify allowing government actions to escape close scrutiny.[112] In doing so, it strongly suggested that the judicial decisions convicting Korematsu and affirming the conviction erred by not employing little perception deference and little means deference.

Similarly, a high degree of perception deference and a high degree of means deference is possible. While rare in practice, the Supreme Court effectively embraced this combination in *Ex parte Vallandigham* where it concluded that it lacked jurisdiction to review the proceedings of a military commission that tried, sentenced, and imprisoned a citizen for expressing sympathy for the South in the Civil War.[113] Although it decided this case on institutional power grounds,[114] the Supreme Court refused to second-guess the government's perception of a threat and the means chosen to address the threat. Such an approach represents high perception deference and high means deference because the Supreme Court repudiated its power to review the military commission's decision. It effectively entrusted civil liberties to the protection of military decisionmakers.

There are three slight qualifications to the model offered. First, it is also entirely possible that deference may occur in different forms beyond perception deference and means deference. Identifying those additional forms is a worthy next step for scholarship.[115] Second, the perception and means inquiries

---

111. *See id.* at 194 (noting the reading of *Hirabayashi* that courts should not second-guess government branches' choice of means responding to threats in war when the Constitution delegates war-making authority to those branches).

112. *See* Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

113. *See Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 251-54 (1863).

114. *See id.* at 252.

115. In recent years, a number of scholars have attempted to evaluate judicial decisionmaking in times of war by presenting institutional models that contend that a critical fact in whether the Supreme Court defers to the government is the extent to which the political branches oversee and authorize the government's actions. *See, e.g.*, Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 22-25 (2004) (suggesting that the Japanese-American cases represent an institutional process model where the Supreme Court is more willing to uphold the government's actions when Congress authorizes the executive's actions); *cf.* Michael Cook, Note, *"Get Out Now or Risk Being Taken Out by Force": Judicial Review of State Government Emergency Power Following a Natural*

sometimes inform each other. A judge's perception that an emergency exists with a great potential for toppling national sovereignty would almost certainly influence whether the judge exercises discretion to defer to another decisionmaker's judgment about the best means of responding to the threat. Similarly, a judge's perception that no threat exists affects whether the judge will uphold the government's policies. For example, in *Endo* the Supreme Court's independent judgment that Endo did not pose a security threat motivated the Supreme Court to strike down the internment without inquiring into the appropriateness of the means chosen.[116] Nevertheless, these cases seem rare. In most cases, the degrees of perception and means deference will probably differ. That said, the potential for one inquiry to influence the other inquiry highlights the importance of treating the perception and means inquiries distinctly to ensure analytic precision. Third, the new model offered does not purport to explain judicial deference in all contexts. For instance, it probably does not apply except at a very general level to appellate courts' deference to judge and jury determinations at a lower level. Nevertheless, the model provides a useful means to evaluate judicial deference in national emergency contexts where civil liberties and security needs stand in tension.[117] Additionally, it could have broad implications for administrative law because it provides a useful means to evaluate deference anytime a decisionmaker has authority to perceive a problem and to choose the means to respond to the perceived problem.

These qualifications aside, the model has three substantial advantages over assessments of judicial deference only as a matter of degree[118] or, bluntly, as a condition either present or not present.[119] First, it offers greater precision in assessing precisely which aspects of the government's decisionmaking process received deference and which aspects did not. Having a precise account is

---

Disaster, 57 CASE W. RES. L. REV. 265, 269 (2006) (arguing that courts used a two-pronged test to review emergency powers consisting of a "Process Prong" where courts evaluate whether politically accountable government branches have approved of the emergency action and a "Reasonableness Prong" where courts evaluate an action's reasonableness). The model offered in this Note does not conflict with these institutional process arguments. In fact, these institutional process arguments may suggest a third form of deference that considers the institutional considerations affecting judicial review.

116. *See Ex parte* Endo, 323 U.S. 283, 302 (1944).

117. The civil liberties affected by the model include any rights affecting individual freedom that potentially undermine the government's attempts to protect national security. *Cf.* POSNER, *supra* note 2, at 149 (defining civil liberties broadly to include all aspects of the law with implications for individual freedom).

118. *See* sources cited *supra* note 93.

119. *See* sources cited *supra* note 94.

critical to assessing trends over time in national emergency jurisprudence and whether, if ever, Cicero's maxim that "[w]hen arms speak, the laws are silent"[120] has been true. Second, it provides helpful guidance when judges balance civil liberties and security needs during national emergencies. Many scholars condemn the balance between civil liberties and national security that the Supreme Court reached in the Japanese-American cases.[121] If they are correct, high means deference and low perception deference is a normatively suboptimal combination. If means deference is more consequential for protecting civil liberties than perception deference,[122] two combinations that may strike a better balance are high perception deference and low means deference, and low perception deference and low means deference. By analytically separating the aspects of government decisionmaking, judges may be able to identify the proper degree of deference for each form to reach a proper accommodation of civil liberties and security needs before deciding difficult cases. Third, by highlighting the consequences of judicial deference for the balance between civil liberties and security needs, the model enables society to have the difficult, but necessary, normative discussion about how to balance the two compelling interests in advance of national emergencies.

D. Application of the New Framework to the Japanese-American Cases

The Supreme Court consistently exercised a low degree of perception deference and a high degree of means deference in the Japanese-American cases. While the Supreme Court ultimately agreed with the government's position in *Hirabayashi* and *Korematsu*, it only did so after reaching an independent decision interpreting the facts available to it that Japanese-Americans posed a security threat. The Supreme Court's independent inquiry produced the opposite conclusion in *Endo*, motivating the Supreme Court to strike down the internment policy.[123] In short, *Hirabayashi*, *Korematsu*, and

---

120. CICERO, *supra* note 5, at 17.

121. *See, e.g.*, Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 586-87 (1995); Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 805-06 (2006); Yen, *supra* note 51, at 7.

122. Even if means deference is more important, the perception inquiry still matters. The perception inquiry alone caused the Supreme Court to strike down the internment of Japanese-Americans known to be loyal in *Ex parte Endo* by holding that a Japanese-American known to be loyal posed no security threat. *See Ex parte* Endo, 323 U.S. 283, 297 (1944).

123. *See Endo*, 323 U.S. at 297.

Endo are not simple stories of the Supreme Court blindly adopting all aspects of government decisionmakers' conclusions. The Supreme Court's approach was more nuanced and complex.

1. *Perception Deference*

The Supreme Court did not defer to government decisionmakers' perception of a threat in the Japanese-American cases. Rather than adopting the government's conclusion that a threat of espionage and sabotage existed, the Supreme Court made an independent decision about whether Japanese-Americans posed a security threat. Just because the Supreme Court reached the same conclusion that government decisionmakers reached concerning the scope and scale of the threat in *Hirabayashi* and *Korematsu* does not mean that judicial deference occurred. Agreement or disagreement with another decisionmaker's conclusion is irrelevant to whether judicial deference occurs.[124] Thus, the different results of the Supreme Court's inquiry do not suggest a different degree of judicial deference to the government's perception of a threat.

a. Hirabayashi

In *Hirabayashi*, the Supreme Court passed judgment on the government's perception of an external threat from the Japanese military and an internal threat from disloyal Japanese-Americans. It concluded that the perception of a broad national emergency from extrinsic Japanese military forces was reasonable.[125] In reaching this conclusion, the Supreme Court evaluated the significance of facts on the record concerning the Japanese military's success and the relatively weak state of the American military in the Pacific between the attack on Pearl Harbor and early 1942 when government decisionmakers began instituting curfews.[126] Because the Supreme Court concluded that these factors made the government's perception of a threat reasonable, it necessarily passed judgment on available facts by assigning them weight and considering their significance. While a reasonability inquiry is certainly not de novo review, it necessarily involves second-guessing. Thus, the Supreme Court did not merely adopt the government decisionmakers' conclusion without passing judgment on the available facts. By definition, it did not defer.

---

124. *See* Horwitz, *supra* note 23, at 1075.

125. Hirabayashi v. United States, 320 U.S. 81, 94 (1943).

126. *See id.* at 93-94.

The Supreme Court also reviewed the factual context surrounding government decisionmakers' perception of an internal security threat from supposedly disloyal Japanese-Americans. After concluding that Congress and the executive provided the military with sufficient authority to promulgate curfews for Japanese-Americans,[127] the Supreme Court stated that the Constitution gave Congress and the executive broad discretion in perceiving a threat and choosing the proper means of responding to the threat:

> Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the *nature and extent of the threatened injury or danger* and in the selection of the *means* for resisting it.[128]

Immediately after this sentence, the Supreme Court strongly suggested that in situations such as the circumstances under which the political branches authorized the curfew policy, courts should effectively suspend judicial review and not second-guess the duly authorized policymaker:

> Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of *means* by those branches of the Government on which the Constitution has placed the responsibility of warmaking, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.[129]

If the Supreme Court's opinion stopped here, it would be true that the Supreme Court exercised a high level of perception deference. The Supreme Court would have then refused to second-guess the government's judgment about whether Japanese-Americans posed an internal security threat. But that did not happen. The first sentence of the Supreme Court's next paragraph strongly suggested the Supreme Court then proceeded to take the step it just purported to reject by engaging in judicial review: "The actions taken must *be appraised* in the light of the conditions with which the President and Congress were confronted in the early months of 1942 . . . ."[130] Thus, immediately after

---

127. *Id.* at 92.

128. *Id.* at 93 (emphasis added).

129. *Id.* (emphasis added).

130. *Id.* (emphasis added). While the passive voice construction unfortunately left ambiguous the identity of the actor responsible for reviewing the military's decisions, it seems far-

stating a principle suggesting absolute perception deference given emergency conditions, the Supreme Court conspicuously violated the principle.[131] At the very minimum, this move suggests that deference in *Hirabayashi* is a more complex and nuanced story than appears at first blush.

The most important factor undermining deferential language in *Hirabayashi* is the Supreme Court's independent judgment concerning whether the military's perception of an internal threat was reasonable.[132] In reaching its decision, the Supreme Court relied on factors including the concentration of Japanese-Americans on the West Coast;[133] the concentration of vital industries for the war effort where the military imposed curfews;[134] Japanese-Americans' insularity and lack of assimilation;[135] the large portion of Japanese-Americans sent to Japanese language schools, some of which supposedly cultivated loyalty to Japan;[136] Japan's practice of recognizing the children of Japanese immigrants to the United States as Japanese citizens in many instances;[137] the close relationship between influential community members and Japanese consulates;[138] and the practical and legal restrictions limiting Japanese-Americans' opportunities in the United States.[139] Weighing the significance of these factors, the Supreme Court concluded that the government's perception of an internal threat was reasonable because some grounds existed to justify singling out Japanese-Americans for unique treatment on the West Coast.[140]

Additionally, the Supreme Court concluded that the facts and rational inferences from the facts supported the military's judgment concerning the danger and imminence of a threat from espionage and sabotage.[141] Although a

---

fetched to suggest that the Supreme Court was referring to something other than judicial review.

131. In *Korematsu*, the Supreme Court also belied the principle stated in *Hirabayashi* by referring to the serious consideration given in *Hirabayashi* to whether there was an unconstitutional delegation of powers, whether the curfew policy exceeded the government's war powers, and whether the curfew policy represented unconstitutional racial discrimination. Korematsu v. United States, 323 U.S. 214, 217 (1944).

132. *See Hirabayashi*, 320 U.S. at 95.

133. *Id.* at 96.

134. *See id.* at 95.

135. *Id.* at 96.

136. *Id.* at 97.

137. *Id.*

138. *Id.* at 98.

139. *Id.*

140. *Id.* at 101.

141. *Id.* at 103-04.

troubling conclusion today, the Supreme Court also found that Japanese ancestry was probative evidence of potential disloyalty because Japan threatened America's shores and Japanese-Americans shared a common ancestry with the enemy's soldiers.[142] Having reviewed the scope and scale of the threat of Japanese-Americans engaging in espionage and sabotage, the Supreme Court upheld Hirabayashi's conviction for violating the military's curfew policy.[143]

Advocates of the conventional understanding of the Japanese-American cases suggest that the Supreme Court accepted without critical review the government's perception of an internal threat from disloyal Japanese-Americans.[144] The reasons offered for this conclusion include the supposed absence of evidence supporting the military's assertions and judicial notice given to the military's generalized conclusions about the threat posed by Japanese-Americans.[145] However, neither of these reasons is compelling. The better explanation of *Hirabayashi* is that the Supreme Court reached an independent judgment agreeing with the government's perception of a threat.

The two reasons ignore the fact that the Supreme Court did engage in a reasonableness inquiry and found adequate support for the military's perception of a threat.[146] Without passing judgment on the facts underlying the military's perception of a threat, the Supreme Court could not have concluded that the perception was reasonable.[147] While a reasonableness inquiry is not the same as de novo review, it does require an independent decision interpreting the significance of available facts. By definition, the resulting conclusion is not the product of deference because it necessarily requires second-guessing the government's conclusion. In contrast, if the Supreme Court had exercised a high degree of perception deference, it would have suspended any independent decision about the nature of the threat posed by Japanese-Americans. The Supreme Court did not take that step.

b. Korematsu

The Supreme Court also exercised a low degree of perception deference in *Korematsu*. As in *Hirabayashi*, the Supreme Court independently evaluated the

142. *See id.* at 101.

143. *See id.* at 105.

144. *See, e.g.*, Lichtman, *supra* note 95, at 936; Yamamoto, *supra* note 36, at 1.

145. *See, e.g.*, Yamamoto, *supra* note 36, at 1-2.

146. *Hirabayashi*, 320 U.S. at 104.

147. *See id.* at 101-02.

facts before it and second-guessed government decisionmakers' perception of a threat. The best evidence is that the Supreme Court expressly rejected the argument that racial prejudice motivated the government's perception of a threat.[148] Because the Supreme Court reached its conclusion by considering the "real military dangers"[149] surrounding the government's perception of a threat, the Supreme Court reached an independent conclusion interpreting the set of facts before it. Having reached an independent conclusion, the Supreme Court by definition did not defer.

In reaching the conclusion that "real military dangers"[150] existed justifying the government decisionmakers' perception of a threat, the Supreme Court interpreted the significance of several facts appearing on the record and concluded that some Japanese-Americans were disloyal. These facts included the refusal of about five thousand Japanese-Americans to swear unqualified loyalty to the United States over Japan and the repatriation requests of several thousand Japanese-Americans.[151]

Additional facts that led the Supreme Court to conclude that the perception of a threat was justifiable were that the United States was at war with Japan,[152] quick action was imperative,[153] and "[t]here was evidence of disloyalty on the part of some."[154] Based on these facts, the Supreme Court concluded that the military's perception of a threat at the time it devised the exclusion policy was justifiable.[155] Because the Supreme Court evaluated facts on the record to find justification for the perception of a threat from disloyal Japanese-Americans, the Supreme Court did not merely adopt government decisionmakers' conclusions concerning their perception of a threat. Thus, the Supreme Court did not defer.

As with *Hirabayashi*, scholars have cited much of the same language in *Korematsu* for their contention that the Supreme Court blindly deferred to the military's perception of a threat.[156] However, these arguments cannot account

---

148. Korematsu v. United States, 323 U.S. 214, 223 (1944).

149. *Id.*

150. *Id.*

151. *Id.* at 219.

152. *Id.* at 223.

153. *Id.* at 224.

154. *Id.* at 223.

155. *See id.* at 224.

156. *See, e.g.*, Lichtman, *supra* note 95, at 936; Yamamoto, *supra* note 36, at 9; *see also* Walter F. Murphy, *Civil Liberties and the Japanese American Cases: A Study in the Uses of* Stare Decisis, 11 W. POL. Q. 3, 4-5 (1958) ("The Court, without any substantial evidence other than the word

for the elements of *Korematsu* reflecting an independent judgment concerning the military's perception of a threat. Had the Supreme Court exercised a high degree of perception deference, it would not even have purported to police the government's decision under the "most rigid scrutiny"[157] to evaluate whether racial prejudice motivated the military's exclusion policy. Moreover, the Supreme Court would not have bothered evaluating the factual record presented to the Court, as distorted as it was,[158] to determine whether the military's perception of an internal security threat by Japanese-Americans at the time it devised the exclusion order had any basis in fact.[159] As in *Hirabayashi*, the fact that the Supreme Court went through the process of reaching an *independent judgment* in reviewing the record available to it negates the position that complete perception deference occurred.

c. Endo

Lastly, the Supreme Court exercised a low degree of perception deference in *Endo*. Rather than simply deferring to the government's perceived need to continue detaining Japanese-Americans in internment camps, the Supreme Court reached an independent judgment that the government lacked the authority to intern Japanese-Americans found to be loyal.[160] Despite conceding that Endo was "a loyal and law-abiding citizen"[161] and "that it is beyond the power of the War Relocation Authority to detain citizens against whom no charges of disloyalty or subversiveness have been made for a period longer than that necessary to separate the loyal from the disloyal and to provide the necessary guidance for relocation,"[162] the government nevertheless claimed authority to detain Japanese-Americans who refused to follow the

---

of the commanding general, accepted every contention of the government."); Yamamoto, *supra* note 36, at 21 ("In both the *Hirabayashi* and *Korematsu* decisions, the Court adopted without factual scrutiny the military's unsubstantiated assertion of necessity."); *id.* at 27 (noting that the Court gave an "extreme degree of deference to military judgment in *Korematsu*").

157. *Korematsu*, 323 U.S. at 216.

158. In the early 1980s, the military's deliberate suppression of evidence undermining its arguments in *Korematsu* came to light and motivated a movement to reverse the convictions of Japanese-Americans charged with violating the military's policies. *See* Irons, *supra* note 65, at 4-5.

159. *See Korematsu*, 323 U.S. at 218.

160. *See Ex parte* Endo, 323 U.S. 283, 302 (1944).

161. *Id.* at 294.

162. *Id.* at 295.

government's prescribed leave procedures.[163] The government argued that it had authority pursuant to Executive Order No. 9102 "to make regulations necessary and proper for controlling situations created by the exercise of the powers expressly conferred for protection against espionage and sabotage."[164] The government also cited the extraordinary powers it possessed because of the state of war:

> We believe there is a reasonable basis for the view that under the rare conditions which gave rise to the program the Constitution does not require abandonment of the requirement of leave application and that, in the light of the extraordinary powers invoked by reason of the war, detention pending such application is not so unreasonable or so unrelated to the causes which gave rise to it as to transcend the war power and fall under the condemnation of the Fifth Amendment.[165]

Based on these factors, the government argued that the detention was essential to the evacuation program[166] and should be upheld.[167]

Critically reviewing the available evidence, the Supreme Court rejected the government's argument. Rather than merely accepting government decisionmakers' perception of their authority to detain Endo, the Supreme Court was skeptical. It applied the canon of constitutional avoidance by presuming that Congress and the executive branch did not intend to authorize potentially unconstitutional acts, presumably meaning the detention of Japanese-Americans conceded to be loyal.[168]

After invoking this preference for constitutionally unproblematic interpretations, the Supreme Court narrowly read the authorization given to policymakers by Congress and the executive as limited to protecting the war effort against espionage and sabotage[169] after considering the text of the

---

163. *See id.* at 297.

164. *Id.*

165. Brief for the United States at 82, *Endo*, 323 U.S. 283 (No. 70).

166. *Endo*, 323 U.S. at 295.

167. *E.g.*, Brief for the United States, *supra* note 165, at 45.

168. *Endo*, 323 U.S. at 299-300 ("We have likewise favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality. . . . In interpreting a wartime measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the lawmakers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.").

169. *See id.* at 300.

authorizations and the legislative history.[170] Having independently reviewed the sources supposedly justifying the detention of citizens conceded to be loyal,[171] the Supreme Court concluded that government decisionmakers lacked authority to detain citizens conceded to be loyal because the government's detention power derived from its power to protect against espionage and sabotage, and those people conceded to be loyal posed no such threat to the war effort.[172]

Additionally, the Supreme Court concluded that "[n]or may the power to detain an admittedly loyal citizen or to grant him a conditional release be implied as a useful or convenient step in the evacuation program, whatever authority might be implied in case of those whose loyalty was not conceded or established."[173] After reaching these conclusions through an independent reading of the text and legislative history, the Supreme Court ordered Endo's unconditional release.[174]

Although slightly different from *Hirabayashi* and *Korematsu* because of its focus on institutional authorization, *Endo* nonetheless represents low perception deference. Not only did the Supreme Court independently evaluate the facts before it to conclude that no threat existed from concededly loyal Americans,[175] but the Supreme Court also decided that such detention had no relationship whatsoever to furthering the government's exclusion policy.[176] Because the Supreme Court reached these judgments through an evaluation of the circumstances surrounding Endo's detention and the series of authorizations purportedly justifying her detention, the Supreme Court second-guessed the military.

2. *Means Deference*

In contrast to perception deference, a high degree of means deference occurred in *Hirabayashi* and *Korematsu*. Having found that sufficient basis existed for the military to conclude a threat existed in *Hirabayashi* and *Korematsu*, the Supreme Court accepted without critical inquiry government decisionmakers' judgments about the means of addressing the threat of

---

170. *Id.* at 300-01.

171. *See* Brief for the United States, *supra* note 165, at 42.

172. *See Endo*, 323 U.S. at 302.

173. *Id.*

174. *Id.* at 304.

175. *See id.* at 302.

176. *See id.*

espionage and sabotage supposedly posed by disloyal Japanese-Americans. Despite claiming to apply "the most rigid scrutiny" to the curfew and expulsion policies,[177] the Supreme Court did not decide for itself whether there were alternatives to address the threat.[178] Because the Supreme Court independently concluded that no threat existed in *Endo*,[179] it did not reach the means inquiry.

a. Hirabayashi

Beginning from the premise that the government's war power necessarily included "the power to wage war successfully,"[180] the Supreme Court expressly refused to pass judgment on the military's choice of means in *Hirabayashi*. It stated:

> Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of *means* by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.[181]

Additionally, the Supreme Court found a constitutional basis for extending a high level of means deference to the military, holding that the Constitution gave the military broad discretion to determine the means chosen to address perceived threats in warfare.[182] Framing the decisionmakers' choice as between effecting substantial harm on Japanese-Americans by imposing a curfew or ignoring a meaningful threat,[183] the Supreme Court concluded that the Constitution did not require decisionmakers to ignore the threat of espionage and sabotage by Japanese-Americans.[184] Despite insisting that the curfew policy was only justifiable if reasonably connected to addressing the threat of espionage and sabotage,[185] the Supreme Court never truly made this inquiry. It only cursorily considered the appropriateness of the fit between the end and

---

177. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

178. *See id.*; Hirabayashi v. United States, 320 U.S. 81, 105 (1943).

179. *See supra* Subsection II.D.1.c.

180. *Hirabayashi*, 320 U.S. at 93 (citation omitted).

181. *Id.* (emphasis added).

182. *Id.*

183. *See id.* at 95.

184. *See id.*

185. *See id.* at 101.

the means. It found the curfew policy "an appropriate measure against sabotage" and "an obvious protection against the perpetration of sabotage most readily committed during the hours of darkness."[186] In the end, the Supreme Court acknowledged that it did not critically review the means chosen. It openly conceded that whether it would have chosen the same means of addressing the threat was irrelevant.[187] A comparison of the Supreme Court's veritable laundry list of reasons justifying the government's perception of a threat with the very limited discussion exploring the reasons for the government's choice of means shows the difference in degree of deference employed in the same case.

b. Korematsu

A high degree of means deference also occurred in *Korematsu*. Concluding at the beginning that the exclusion policy's purpose was to address the threat of espionage and sabotage,[188] the Supreme Court summarily found that "exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage."[189] Rather than passing judgment on available facts, the Supreme Court effectively adopted the government's conclusion concerning the proper means by finding that the military possessed institutional authority to make the judgment.[190]

Once the Supreme Court found sufficient institutional authority to choose the proper means, the inquiry stopped. It never considered whether a less restrictive means was available to address the perceived threat. Instead, the Supreme Court found it sufficient that the government's judgments underlying the internment policy were not facially unfounded. This approach created a nearly irrefutable presumption favoring the government's choice of means.[191]

186. *See id.* at 99.

187. *See id.* at 102.

188. *See* Korematsu v. United States, 323 U.S. 214, 217 (1944).

189. *See id.* at 218.

190. *Id.* ("The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.").

191. *See id.*

c. Endo

In *Endo*, the Supreme Court did not have an opportunity to reach an independent decision concerning the means or defer to the government's choice of means. Once it independently concluded that no threat existed from a concededly loyal Japanese-American, the internment policy was necessarily unjustifiable and unauthorized.[192] Because it seems logically impossible to uphold the means chosen to respond to a threat held to be nonexistent, where the means affect important civil liberties, *Endo* represents neither deference nor lack of deference. The Supreme Court effectively lacked one of the requirements for judicial deference: freedom to uphold the government's choice of means—the internment policy—after concluding that no threat existed.[193] The connection between the outcome of the perception deference inquiry and the means deference inquiry in this context shows the importance of treating the two concepts as analytically distinct. As Part III illustrates, the consequences of collapsing the two inquiries can be disastrous.

III. IMPLICATIONS OF JUDICIAL DEFERENCE IN THE JAPANESE-AMERICAN CASES

This Note's conclusion that the Supreme Court exercised little perception deference in all three Japanese-American cases and complete means deference to the extent possible has implications for four debates that have received heightened attention in recent years. These debates concern (1) the correctness of the Supreme Court's decisions in the Japanese-American cases, (2) general criticisms of judicial deference, (3) how the Supreme Court balances civil liberties and security, and (4) whether and how to accommodate extraordinary situations under the Constitution.

All four controversies assign significance to the process of reasoning by which the Supreme Court reached the outcomes in the Japanese-American cases. By rejecting the conventional understanding of this process, this Note's conclusion shows that the parameters of these discussions ought to change. In doing so, this Note undermines the argument that "deference implies difference" because "deference only has meaning if the court addressing the matter independently would reach a conclusion different from that of the Executive or the Legislature."[194] As the importance of assessments of judicial

192. *See supra* Subsection II.D.1.c.

193. *See supra* Section II.A.

194. Schapiro, *supra* note 90, at 665.

deference within these debates illustrates, deference has meaning even if a court's conclusion is the same as another decisionmaker's conclusion. Deference without difference matters.

A. Implications for Criticisms of the Japanese-American Cases

The degrees and forms of judicial deference employed in the Japanese-American cases have implications for criticisms of these cases. Scholarly critiques tend to fall in two categories: criticisms of the Supreme Court for not taking Japanese-Americans' rights seriously[195] and of the conclusions reached concerning the threat of Japanese-Americans committing espionage and sabotage.[196] Within these two debates, this Note's conclusion cuts in two surprising directions. It simultaneously undermines the argument that the Supreme Court failed to take Japanese-Americans' rights seriously and may support negative critiques of the holdings that Japanese-Americans posed a security threat in *Hirabayashi* and *Korematsu*.

1. Not Taking Rights Seriously

Some scholars assert that the Supreme Court ignored Japanese-Americans' civil liberties in the Japanese-American cases.[197] This position begins from the premises that judicial deference is improper in national emergency contexts[198] and that the more a court defers to another decisionmaker's judgment, the less it protects civil liberties.[199] Based on these premises and the supposedly very high or categorical deference exercised in the Japanese-American cases,[200] scholars criticize the Supreme Court for completely failing to protect Japanese-Americans' civil liberties.[201] However, as Part II demonstrates, the Supreme

---

195. *See, e.g.*, REHNQUIST, *supra* note 6, at 209; Burt Neuborne, *The Role of Courts in Time of War*, 29 N.Y.U. REV. L. & SOC. CHANGE 555, 567-68 (2005); Rostow, *supra* note 14, at 489-91; Solove, *supra* note 17, at 998-1000.

196. These criticisms tend to focus on the alleged racism inherent in the premise that race had a rational relationship to disloyalty among Japanese-Americans. *See, e.g.*, Rostow, *supra* note 14, at 505-06; Yen, *supra* note 51, at 7.

197. *See* Luppen, *supra* note 94, at 1133-34; Neuborne, *supra* note 195, at 567-68; Solove, *supra* note 17, at 998-1000; Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 93.

198. *See* Gross, *supra* note 17, at 1034; Stone, *supra* note 17, at 2208.

199. *See* Stone, *supra* note 17, at 2209 (suggesting that the more a court defers to the government's judgment in national emergencies, the less it protects civil liberties).

200. *See* sources cited *supra* notes 93-94.

201. *See* sources cited *supra* note 197.

Court exercised only partial deference and, in fact, reached an independent judgment concerning the threat of espionage and sabotage.[202] Therefore, the Supreme Court protected civil liberties more than commonly supposed. That is not to say that the protection was necessarily normatively appropriate. However, it does imply that criticisms require greater nuance to be completely persuasive.

2. *Conclusions Reached*

In contrast, this Note provides new evidence that may support criticisms of the Supreme Court for upholding policies based on the internal security threat supposedly posed by Japanese-Americans in *Hirabayashi* and *Korematsu*.[203] Because the Supreme Court exercised a low degree of perception deference, it independently concluded that race was probative evidence of loyalty,[204] contrary to critics' assumption that the Supreme Court completely deferred to the government.[205] The Supreme Court's role in reaching this conclusion was greater than commonly assumed, which may make its practice more normatively contemptible under the logic that it is worse to reach an invidious conclusion independently than to reach it through deference.

B. Implications for General Criticisms of Judicial Deference

The Supreme Court's practice of judicial deference in the Japanese-American cases cuts both ways concerning general critiques of judicial deference. While it undermines theoretical criticisms that argue against the practice of judicial deference in any context, it may or may not support practical criticisms arguing that judicial deference is singularly inappropriate in national emergency contexts.

1. *Theoretical*

Theoretical criticisms of judicial deference argue that judges should not defer to other decisionmakers' judgments because doing so results in an

---

202. *See supra* Section II.D.

203. *See, e.g.*, Rostow, *supra* note 14, at 505-06; Yen, *supra* note 51, at 7.

204. *See supra* Section II.D.

205. *See, e.g.*, Rostow, *supra* note 14, at 505-06.

abdication of judicial responsibility to protect civil liberties.[206] They argue that history shows that judicial deference "tends to override whatever level of scrutiny [courts] appl[y] and [be] dispositive" of case outcomes,[207] even in cases affecting fundamental civil liberties.[208] Because of judges' expertise in critical inquiry[209] and ability to focus on individualized questions of justice,[210] judges should arguably never defer to the judgment of government decisionmakers.[211]

The Supreme Court's practice of judicial deference in the Japanese-American cases highlights an important flaw in theoretical criticisms. These criticisms presume that the presence of judicial deference necessarily insulates government decisions affecting civil liberties from critical review.[212] Under this logic, when deference is present, courts automatically legitimize consequential decisions for civil liberties without judicial inquiry by adding "a judicial stamp of approval for the decisions made by government officials in the bureaucratic state."[213]

Strictly speaking, this description is inaccurate. Its monolithic conception of deference presumes that the degree of judicial deference cannot differ for the different aspects of government decisionmaking subject to judicial review. That assumption is wrong. The high degree of deference given to the government's choice of means in *Hirabayashi* and *Korematsu* did not impede the Supreme Court from giving a low degree of deference to the government's perception of a threat.[214] Therefore, a high degree of judicial deference and critical review may be simultaneously present in the same case.

---

206. *See, e.g.*, Solove, *supra* note 17, at 1020; *cf.* Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639, 691 (1992) (arguing that judges should not defer to judgments by mental health professionals in state institutions).

207. Solove, *supra* note 17, at 955; *cf.* Wells, *supra* note 17, at 908 (arguing against judicial deference because of the usefulness of critical review in promoting knowledge of accountability and thereby producing better decisions).

208. *See, e.g.*, Solove, *supra* note 17, at 960-61.

209. *See id.* at 1011-12.

210. *See id.* at 1018.

211. *Cf.* Yamamoto, *supra* note 36, at 41-42 ("Except as to actions under civilly-declared martial law, the standard of judicial review of government restrictions of civil liberties of Americans is not altered or attenuated by the government's contention that 'military necessity' or 'national security' justifies the challenged restrictions.").

212. *See* Solove, *supra* note 17, at 1020.

213. *Id.*

214. *See supra* Section II.D.

2. *Practical*

Practical criticisms of judicial deference in national emergency contexts argue that judicial deference is particularly inappropriate in these circumstances.[215] An important practical criticism is that the government tends to exaggerate the extent and scope of security threats during national emergencies in order to amass power.[216] This criticism focuses on the government's tendency to push the balance between civil liberties and security unnecessarily toward security during national emergencies. To counter this problem, practical criticisms favor vigorous judicial review to ensure some measure of governmental accountability, to check government decisionmakers from overreaching, and to avoid needless repetition of past mistakes.[217]

The high degree of means deference present in *Hirabayashi* and *Korematsu* supports criticisms of the Supreme Court's practice of deference in past national emergencies. The Supreme Court deferred to the military about the best means to respond to the perceived threat, tolerating restrictive means—curfew and exclusion—without deciding for itself whether a less restrictive policy could adequately address the threat.[218] It accordingly did not decide for itself whether the policies promoted the greatest degree of protection for civil liberties possible given the perceived threat. Therefore, the Supreme Court does seem to have refused to exercise a check that may have prevented the government from unnecessarily sacrificing Japanese-Americans' civil liberties.

Nevertheless, the low degree of perception deference exercised in *Hirabayashi*, *Korematsu*, and *Endo*[219] undermines practical criticisms by showing that judicial review may not be a panacea for unnecessary sacrifices of civil liberties. Even though the Supreme Court reached an independent judgment concerning the government's perception of a threat in *Hirabayashi* and *Korematsu*, it still reached conclusions that many consider to represent an

---

215. *See* Gross, *supra* note 17, at 1034; Stone, *supra* note 17, at 2208-09; *cf.* Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1218 n.240 (2007) ("[D]eference to the military's judgment that the Guantanamo detainees are enemy combatants would be inappropriate."); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1282 (2007) ("[S]ubstantial deference to the executive is singularly inappropriate in . . . foreign relations law that operates in the executive-constraining zone.").

216. *See* Stone, *supra* note 17, at 2208.

217. *See* Wells, *supra* note 17, at 949.

218. *See supra* Subsection II.D.2.

219. *See supra* Subsection II.D.1.

unnecessary deprivation of civil liberties.[220] Thus, judicial review may not always prevent unnecessary deprivations of civil liberties during national emergencies.

C. *Implications for the Balance Between Civil Liberties and Security*

An important implication of the Supreme Court's exercise of low perception deference and high means deference in the Japanese-American cases is that the balance between civil liberties and security during national emergencies shifts less than traditionally anticipated. Scholars have long assumed that the Japanese-American cases represent a preference for security over civil liberties.[221] But if that argument is correct, it seems inexplicable for the Supreme Court to have exercised low perception deference after the government invoked security needs.

National emergencies strain the balance between civil liberties and security.[222] Because efforts to promote security often come at the expense of civil liberties, a tradeoff exists between the two values where one's gain is the other's loss.[223] This tension leads to a heightened risk of government

---

220. *See* Yamamoto, *supra* note 36, at 29-30.

221. *See, e.g.*, Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's* Korematsu *and* Endo *Decisions*, 45 COLUM. L. REV. 175, 238 (1945); Stone, *supra* note 17, at 2206; Micah Herzig, Note, *Is* Korematsu *Good Law in the Face of Terrorism? Procedural Due Process in the Security Versus Liberty Debate*, 16 GEO. IMMIGR. L.J. 685, 686-87 (2002); Lin, *supra* note 34, at 1917-18.

222. *See* REHNQUIST, *supra* note 6, at 224; Gross, *supra* note 17, at 1028; Issacharoff & Pildes, *supra* note 17, at 298; Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 767 (2002).

223. *See* POSNER, *supra* note 2, at 31-32; Cole, *supra* note 12, at 2567. Some scholars reject the argument that a zero-sum tradeoff exists between civil liberties and national security, describing this tradeoff as a false choice. *See, e.g.*, Nadine Strossen, *Keeping the Constitution Inside the Schoolhouse Gate—Students' Rights Thirty Years After* Tinker v. Des Moines Independent Community School District, 48 DRAKE L. REV. 445, 471 (2000); Thomas P. Crocker, *Torture, with Apologies*, 86 TEX. L. REV. 569, 612-13 (2008) (book review). Thomas P. Crocker suggests that the tradeoff model is not helpful because it ignores a core value of liberal democracy against performing actions degrading of fundamental human rights such as torture. *See* Crocker, *supra*, at 612. Similarly, Daniel J. Solove criticizes the civil liberties-security paradigm for inherently skewing the results of the balance in favor of security. *See* Daniel J. Solove, *Data Mining and the Security-Liberty Debate*, 75 U. CHI. L. REV. 343, 345 (2008). Nevertheless, the tradeoff paradigm remains highly influential and the primary lens through which scholars have historically evaluated the Japanese-American cases. *See, e.g.*, Susan Kiyomi Serrano & Dale Minami, Korematsu v. United States*: A "Constant Caution" in a Time of Crisis*, 10 ASIAN L.J. 37, 38 (2003); Stone, *supra* note 17, at 2206; Yamamoto, *supra* note 36, at 4-7. For these reasons, Section III.C. considers the implications of judicial

overreaching during national emergencies where society is made worse off by the unnecessary undermining of fundamental civil liberties.[224] The heightened risk, combined with judges' great sensitivity to the potential of causing a catastrophe by not taking security considerations seriously,[225] is a troubling confluence.

The conventional wisdom is that the presence of national emergencies meaningfully affects how judges review government actions responding to threats.[226] According to this view, the historical record shows that courts have effectively established a presumption that restrictions on civil liberties associated with government responses to national emergencies are constitutional.[227] To critics, the presumption of constitutionality illustrates a troubling, but predictable, historical pattern of courts allowing government decisionmakers to go too far in curtailing civil liberties during national emergencies and regretting these decisions as the emergencies abate.[228]

The role of judicial deference in the Japanese-American cases supports the conventional wisdom so long as two assumptions are correct: (1) means deference usually exists in a lower degree in nonemergency contexts and (2) a connection exists between judicial deference and the balance between civil liberties and security. The first assumption seems correct because the Supreme Court's modern forms of scrutiny for Due Process Clause and Equal Protection Clause claims review actions to ensure at least some relationship exists between the means chosen and legitimate government interests.[229] The second assumption seems correct because the less the Supreme Court critically inquires into government decisionmaking, the more protection of civil liberties rests with government decisionmakers with a record of undervaluing civil liberties relative to security during national emergencies.[230] If these two assumptions are correct, the presence of war seriously affected the extent to

---

deference for the debate within the civil liberties and security tradeoff model. It is not a normative endorsement of the model.

224. *See* Neuborne, *supra* note 195, at 555.

225. *See* Gross, *supra* note 17, at 1034.

226. *See, e.g.*, REHNQUIST, *supra* note 6, at 224-25; Tushnet, *supra* note 34, at 281.

227. Stone, *supra* note 17, at 2208. However, Geoffrey R. Stone acknowledges that this trend may be changing in light of the Supreme Court's recent record in adjudicating government actions responding to the threat of terrorism. *See id.* at 2211-12.

228. *See, e.g.*, Ackerman, *The Emergency Constitution*, *supra* note 1, at 1042.

229. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (Due Process Clause); Romer v. Evans, 517 U.S. 620, 631 (1996) (Equal Protection Clause).

230. *See, e.g.*, Cole, *supra* note 12, at 2591-92; Purshaw, *supra* note 29, at 1035-36.

which the Supreme Court critically reviewed the government's policies toward Japanese-Americans in the Second World War.

Nevertheless, the shift was incomplete. Because the Supreme Court exercised a low degree of perception deference,[231] it followed an approach that protected civil liberties more than conventionally assumed. In contrast, if the Supreme Court did completely favor security over civil liberties, it would have exercised a high degree of both perception deference and means deference. However, that did not happen. Not only did the Supreme Court reach an independent judgment that second-guessed the government's perception of a threat in all three cases,[232] the independent judgment proved decisive to the outcome in *Endo*.[233] Therefore, the Supreme Court did not completely favor security needs over civil liberties in the Second World War.

Moreover, the Supreme Court in *Hamdi* struck down the government's actions after exercising a high degree of deference to the government's perception of a threat and a low degree of deference to the government's choice of means in a national emergency context.[234] This also belies the assertion that the balance between civil liberties and security always favors security during national emergencies.

D. Implications for the Emergency Accommodation Debate

Among the most spirited of the four debates is the debate over whether and how the existing constitutional structure should accommodate government actions responding to national emergencies.[235] An important implication of the role of deference in the Japanese-American cases is that, if the Supreme Court pursues a similar course only in emergency contexts, the United States arguably already has an "emergency constitution"[236] that accommodates emergency contexts within the existing constitutional framework. This

---

231. *See supra* Subsection II.D.1.

232. *See id.*

233. *See supra* Subsection II.D.1.c.

234. *See supra* Section II.C.

235. *Compare* Ackerman, *The Emergency Constitution*, *supra* note 1, at 1045 ("We must build a new constitution for the state of emergency . . . ."), *with* Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1868 (2004) ("[W]e might as well *embrace* that anti-emergency Constitution and the rich framework within which we have operated for so long.").

236. *See, e.g.*, Ackerman, *The Emergency Constitution*, *supra* note 1, at 1030 (arguing that a unique regime should exist during national emergencies that allows heightened government powers).

constitution may mitigate government decisionmakers' need for an explicit emergency constitution or extralegal authority to act during national emergencies.[237] While this emergency constitution may be insufficient to protect core civil liberties as evidenced by the Supreme Court's high degree of means deference in *Hirabayashi* and *Korematsu*, it does provide some check on government overreaching through the Supreme Court's critical inquiry into the government's perception of a threat. It may be the emergency constitution we never knew we had. If the Supreme Court's inquiry in *Hamdi* represents a trend toward a high degree of perception deference and a low degree of means deference, it may be an emergency constitution that has improved over time.

1. *Desirability of an Emergency Constitution*

Bruce Ackerman, the leading proponent of the emergency constitution approach, argues that a separate regime should exist to accommodate responses to national crises within a constitutional framework.[238] One of the main reasons Ackerman offers to support his thesis is that a temporary emergency regime anticipated by Ackerman's emergency constitution would enable the government to reassure citizens' confidence that the government's response to national emergencies will be effective without permitting long-term harm to civil liberties.[239] While having a reduced scope compared to nonemergency contexts, the constitution would still cabin government decisions that could harm long-term commitments to freedom and the rule of law.[240] An important justification behind Ackerman's support for an emergency constitution regime is the Supreme Court's record of not seriously protecting core civil liberties from government infringement in past national emergencies, as evidenced by *Korematsu*.[241]

If followed only in national emergency contexts, the Supreme Court's approach in the Japanese-American cases seems to meet the central features of an emergency constitution: it allowed the government flexibility to perform acts that may otherwise have been unlawful while preserving some check on government decisionmaking through critical review into whether a threat truly existed. Nevertheless, because the Supreme Court's high degree of means deference motivated it to uphold the government's curfew and exclusion

---

237. *See, e.g.*, Tushnet, *supra* note 34, at 305.

238. *See* Ackerman, *The Emergency Constitution*, *supra* note 1, at 1030.

239. *See id.* at 1037.

240. *See id.* at 1044.

241. *See id.* at 1042.

policies,[242] the emergency constitution arguably failed to cabin government decisions with long-term implications for freedom and the rule of law, a necessary function of Ackerman's emergency constitution.[243] That said, the Supreme Court's low degree of perception deference through its critical inquiry into government decisionmakers' perception of a threat suggests that the Supreme Court protects core civil liberties more than Ackerman anticipates, as evidenced by *Endo*.

However, the potential inadequacy of the Supreme Court's approach in the Japanese-American cases also supports Ackerman's position to some extent. Even if the Supreme Court's critical inquiry into the government's perception of a threat enabled the Supreme Court to check government overreaching in *Endo*, the Supreme Court's high degree of means deference in *Hirabayashi* and *Korematsu*, if followed in other emergency contexts, may support Ackerman's argument that an entirely different constitutional framework should apply in emergency circumstances to the extent it demonstrates the inadequacy of the current emergency constitution. More forgiving degrees and forms of deference in emergency contexts may not be able to achieve the goals Ackerman has in mind for an emergency constitution. Nevertheless, if *Hamdi* represents a modern approach favoring a high degree of perception deference and a low degree of means deference, it seems plausible that an emergency constitution already exists that gives the government wide latitude to perceive threats in national emergency contexts but still preserves a core of judicial inquiry to prevent unnecessary deprivations of liberty.

2. *Desirability of Allowing Extralegal Acts*

This Note's conclusion also has implications for the debate over whether openly extralegal actions by government decisionmakers should be permissible during national emergencies. Justice Jackson's dissent in *Korematsu* was an important forerunner of the current debate. It anticipated the essence of current arguments by stating that judges should not pretend to exercise judicial review over government actions responding to national emergencies because any review would be inherently inadequate[244] and by arguing that "[i]f we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient."[245] The

242. *See supra* Section II.D.

243. *See* Ackerman, *The Emergency Constitution*, *supra* note 1, at 1044.

244. Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

245. *Id.* at 244.

combination of both statements suggests that Justice Jackson perceived that government decisionmakers could perform extralegal actions without any judicial checks during national emergencies.

Modern proponents of acknowledging extraordinary actions as extralegal go somewhat further than Justice Jackson's dissent.[246] They argue that government decisionmakers should exercise emergency powers in an openly extralegal way so that society understands the actions are extraordinary rather than rationalize unlawful actions under the Constitution.[247] To prevent abuses, this position argues that government officials should have to acknowledge openly and publicly that their actions are extralegal to remain accountable to the public,[248] and must limit extralegal actions to extraordinary circumstances.[249] A central assumption for the extralegal position is that courts have historically proven incapable of constraining government decisionmakers' actions during emergencies,[250] a premise paralleling Jackson's dissent in *Korematsu*. In light of this premise, the extralegal position concludes that, during national emergencies, courts should acknowledge that government officials will inevitably take extralegal actions in such circumstances and refuse to legitimize otherwise unlawful actions by pretending to exercise judicial review.[251] In short, the extralegal position argues that "[j]udges should refrain from giving in to an understandable urge to make exercises of emergency powers compatible with constitutional norms as the judges articulate them, to avoid normalizing the exception."[252]

The role of deference in the Japanese-American cases has ambiguous implications for this debate. On one hand, the Supreme Court deferred to the government's choice of means, the more consequential form of deference as far as civil liberties are concerned. The Supreme Court's high degree of means deference, if practiced in other national emergencies, suggests that Justice Jackson may have been correct that judicial review during national emergencies is inherently inadequate.[253] Because of its inadequacy, the Supreme Court's

---

246. *See* Cole, *supra* note 12, at 2586.

247. *See, e.g.*, Gross, *supra* note 17, at 1133-34; Tushnet, *supra* note 34, at 306. *But cf.* Koh, *supra* note 7, at 29-30 (suggesting that fundamental human rights should constrain the government's actions in response to the terrorist threat).

248. *See* Gross, *supra* note 17, at 1023.

249. *See id.* at 1134.

250. *See* Cole, *supra* note 12, at 2585 & n.103; Tushnet, *supra* note 34, at 287.

251. *See* Tushnet, *supra* note 34, at 299-300.

252. *Id.* at 307.

253. *See* Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

approach may favor allowing the government to perform extralegal actions to the extent the Supreme Court did not meaningfully check government overreaching in *Hirabayashi* and *Korematsu*.

On the other hand, a colorable argument may be made that the Supreme Court's low degree of perception deference sufficiently constrained government actions during the Second World War. If that is true, then the Japanese-American cases undermine the premise that courts have historically failed to constrain government actions during emergencies. Nevertheless, this argument is probably incorrect. While decisive in the extreme case of *Endo*, a low degree of perception deference does not always significantly constrain government decisionmaking. In the Japanese-American cases, judicial review ended once the Supreme Court independently decided that the government's perception of a threat was correct. Such an approach may not be normatively appropriate in the modern terrorism context.

Additionally, the Japanese-American cases refute a central assumption of the extralegal position: government decisionmakers' willingness to acknowledge when they act unlawfully. In *Endo*, the government attempted to justify the ongoing internment of Japanese-Americans known to be loyal within the existing constitutional structure.[254] The ease with which the Supreme Court rejected the government's argument after the government conceded that Endo was loyal[255] suggests that proponents of allowing extralegal actions are wrong to assume that government decisionmakers would openly declare their actions to be extralegal if they could do so. The fact that the government contested the lawfulness of detaining an admittedly loyal citizen implies that either it misunderstood the boundaries of its power during the war or it knowingly sought to validate an extralegal action in the existing constitutional framework. This suggests that the government may have trouble perceiving or may knowingly distort the line between legal and extralegal actions. Given the government's position in *Endo*, a fairly straightforward case, the premise that government decisionmakers would acknowledge when they act unlawfully in the future is dubious.

---

254. *Ex parte* Endo, 323 U.S. 283, 295-96 (1944) (noting the military's argument that the ongoing internment of loyal Japanese-Americans was a necessary component of its evacuation policy); Brief for the United States, *supra* note 165, at 82 (defending the detention as constitutional).

255. *Endo*, 323 U.S. at 302 (concluding that a loyal citizen, by definition, poses no threat of committing espionage or sabotage).

CONCLUSION

What, then, is the disaster of the Japanese-American cases? Descriptively, the disaster is that the role of judicial deference remains fundamentally misunderstood in these important examples of the Supreme Court's national emergency jurisprudence. Because of the heightened importance of these cases in the aftermath of the terrorist attacks on September 11, 2001, as sources of lessons for how courts should review the government's actions to address the terrorism threat,[256] there is a pressing need to assess accurately the role deference played.

There should be three parameters to ensure that prospective normative prescriptions of the lessons of the Japanese-American cases rest on a sound foundation. First, an accurate descriptive analysis of the role of judicial deference requires understanding *Hirabayashi*, *Korematsu*, and *Endo* on their own terms. That means devising a theory that explains judicial deference in all three cases without overvaluing *Hirabayashi* or *Korematsu*, or undervaluing *Endo*. Second, the descriptive analysis should have a nuanced conception of deference that acknowledges that the degree of deference can differ based on the aspects of decisionmaking under review and should express that conception through an analysis that does more than merely provide an overall assessment of degree or state whether or not deference is present. Third, the descriptive analysis should be cautious about generalizing based solely on the Japanese-American cases how judicial deference does or does not occur in national emergency contexts. The degrees and forms of judicial deference are not static. The Supreme Court that refused to reach an independent conclusion concerning the government's choice of means in *Hirabayashi* and *Korematsu* is not the same Supreme Court that critically reviewed the government's choice of means in *Hamdi*.[257] If a prescription fails to fulfill all three parameters, its author should explain why not in order to move the debate forward.

---

256. *See, e.g.*, Roger Daniels, *The Japanese American Cases, 1942-2004: A Social History*, LAW & CONTEMP. PROBS., Spring 2005, at 159; Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment's Shadow*, LAW & CONTEMP. PROBS., Spring 2005, at 255; Eric L. Muller, *Inference or Impact? Racial Profiling and the Internment's True Legacy*, 1 OHIO ST. J. CRIM. L. 103 (2003); *cf.* Ackerman, *The Emergency Constitution*, *supra* note 1, at 1043 ("*Korematsu* has never been formally overruled, a fact that has begun to matter after September 11. Even today, the case remains under a cloud. It is bad law, very bad law, *very, very* bad law. But what will we say after another terrorist attack? More precisely, what will the Supreme Court say if Arab Americans are herded into concentration camps? Are we certain any longer that the wartime precedent of *Korematsu* will not be extended to the 'war on terrorism'?").

257. *See supra* Section II.C.